

ORDER NO. 79775

IN THE MATTER OF THE COMPLAINT
OF CORE COMMUNICATIONS, INC.
AGAINST VERIZON MARYLAND INC.
FOR BREACH OF ITS
INTERCONNECTION AGREEMENT.

(Interlocutory Appeal)

* BEFORE THE
* PUBLIC SERVICE COMMISSION
* OF MARYLAND

* _____
* CASE NO. 9005
* _____

This matter comes before the Public Service Commission (“Commission”) on appeal from the Hearing Examiner’s Ruling on Motion to Dismiss issued in this proceeding on September 14, 2004.

I. BACKGROUND

On August 22, 2002, Core Communications, Inc. (“Core”) filed a formal complaint against Verizon Maryland Inc. (“Verizon”) alleging that Verizon had breached its contractual obligation to interconnect at three wire centers located in Maryland: Mount Airy, Damascus and Salisbury. The Commission held the matter in abeyance until June 3, 2004, when it directed Verizon to satisfy or answer Core’s Complaint. Thereafter, on June 23, 2004, and August 6, 2004, Verizon and Core filed, respectively, a Motion to Dismiss or in the Alternative, Answer and Counterclaims and a Motion to Dismiss or in the Alternative Answer to Verizon’s Counterclaims.

On September 14, 2004, the Hearing Examiner issued a Ruling granting Verizon’s Motion to Dismiss, in part, and denying Core’s Motion to Dismiss Verizon’s counter-claim. Specifically, the Hearing Examiner determined that Core’s claim with respect to the Mount Airy Wire Center was barred by *res judicata* as Core could or

should have litigated that claim in Case No. 8881. Likewise, the Hearing Examiner determined that Core's claim with respect to the Damascus Wire Center was barred by *res judicata* as Core could, or should, have litigated the claim before the Federal Communications Commission ("FCC") as part of its complaint proceeding decided there. The Hearing Examiner further found that there was a factual dispute regarding the interpretation of the agreement governing Core's Salisbury Wire Center claim and, as such, denied this portion of Verizon's Motion to Dismiss and Core's Motion to Dismiss.

On October 7, 2004, Core filed a Notice of Appeal of the Hearing Examiner's Ruling on Motion to Dismiss. Thereafter, on October 18, 2004, Core filed a Memorandum in Support of its Notice of Appeal. Verizon filed a reply thereto on November 8, 2004.¹ On November 24, 2004, Core filed a motion requesting leave to file a response to Verizon's reply contemporaneously with said response. On January 5, 2005, Core filed another motion requesting leave to file a further response to Verizon's reply simultaneously with such further response. On January 14, 2005, Verizon filed an opposition to Core's Motion to File a Further Response to Verizon's Reply Brief on Appeal, or in the Alternative, Response to Core's Further Response.

II. DISCUSSION

On appeal, Core argues that the Hearing Examiner failed to apply the appropriate standard of review for consideration of a motion to dismiss, and instead made a decision

¹ Verizon's Reply Memorandum exceeded the page limitation set by the Commission's rules governing appeals from Proposed Orders of Hearing Examiners, COMAR 20.07.02.13. In the past, the Commission has merely stricken the excess pages from the record. However, Core has sought leave to file a response to Verizon's lengthy reply. The Commission hereby grants Core's request. However, the Commission cautions Verizon to be more mindful of the Commission procedural rules in the future.

based upon the doctrine of *res judicata* without providing deference to Core's interpretation of events. Core also argues that the Hearing Examiner's findings result from a misapplication of the facts and the doctrine of *res judicata*, and is therefore factually and legally incorrect.

Specifically, with respect to this latter argument Core disputes the Hearing Examiner's findings that "Core's Complaint arises from a connected series of successive agreements", and instead maintains that there is no identity of the cause of action in the case *sub judice* and in Case No. 8881. Core argues that the cause of action in both this case and Case No. 8881 arose from separate transactions as demonstrated by what Core identifies as "'substantial material differences' in the facts as well as 'different contract language' [underlying each claim]" *Core Memorandum at 6*. Core, citing *Kent County Bd. of Educ. v. Bilbrough*, 309 Md. 487 (1987), maintains that the question of the identity of the claims should have been resolved in accordance with the "Transaction Test" approved of by the Court of Appeals. *Id.* at 499.

Core also argues that the Hearing Examiner's findings that Core's claims with respect to the Damascus Wire Center are barred by the Federal Communications Commission's ("FCC's") ruling in another interconnection complaint proceeding² involving both Core and Verizon ("FCC Complaint Proceeding") was erroneous. Core clarifies that this proceeding involves Verizon's refusal to use existing facilities to interconnect with Core in the Damascus Wire Center, whereas the FCC Complaint Proceeding involves Verizon's failure to maintain adequate tandem switching facilities in

² In the Matter of Core Communications, Inc. v. Verizon Maryland Inc., FCC File No. EB-01-MD-007, *Memorandum Opinion and Order*, rel. April 23, 2003. ("FCC Complaint Proceeding")

the Washington Metropolitan LATA. *Core Memorandum at 10*. Given this distinction between the two proceedings, Core avers that there is no identity of the claims raised in this proceeding, and those raised in the FCC Complaint Proceeding. Additionally, Core argues that Verizon is estopped from raising *res judicata* on the basis of the FCC Complaint Proceeding due to a settlement agreement entered into by the parties to the FCC Complaint Proceeding.

Finally, Core maintains that the Hearing Examiner's Ruling is in error because Verizon waived its *res judicata* claim by neither objecting to the Commission's decision to hold the Case No. 9005 Complaint in abeyance, nor requesting that the Case No. 9005 Complaint and Case No. 8881 be consolidated. Core also argues that the Commission's decision to hold the Case No. 9005 Complaint in abeyance precludes a finding of *res judicata*.

In reply to Core's Memorandum on Appeal, Verizon initially argues that the appeal is premature, as the Hearing Examiner's Ruling, being interlocutory in nature, is not subject to immediate appeal. Relying on past Commission action in Case No. 8881, Verizon maintains that the Hearing Examiner's ruling does not fall within any of the recognized exceptions enumerated in §12-303 of the Courts and Judicial Proceedings Article pertaining to the appealability of interlocutory orders, or the Maryland Rules.

With respect to the actual issues raised by Core in its Memorandum, Verizon argues that the "Hearing Examiner properly applied established principles of *res judicata* to bar Core's attempt to split its 'inventory policy' claim and litigate issues that it could have, and should have, raised in Case No. 8881." *Verizon Reply at 4*. Likewise, Verizon

opines that, contrary to Core's arguments, the Hearing Examiner applied the correct standard of review.

Specifically, Verizon argues that while the Hearing Examiner and the Commission on a motion to dismiss are required to take the facts in the light most favorable to Core, neither are required to “. . . accept [Core's] *legal* conclusions drawn from the facts' and 'need not accept as true unwarranted inferences, unreasonable conclusion, or arguments.’” *Verizon Reply* at 7 (citation omitted). Verizon concludes that based upon this standard, the Hearing Examiner's Ruling was appropriate, as was his consideration of the underlying interconnection agreements. Verizon also argues that it did not waive its *res judicata* defense as it was under no obligation to provide an answer to the Case No. 9005 Complaint until such time as the Commission directed it to do so. Likewise, Verizon argues that “nothing in the Commission's order holding *this* case in abeyance indicates that it was 'expressly reserv[ing]' Core's right to litigate its August 2002 Complaint on the merits in a successive duplicative suit.” *Verizon Reply* at 17. In its conclusion, Verizon disputes Core's arguments that the FCC Complaint Proceeding does not bar the Damascus Wire Center claim, as well as Core's reliance upon and production of a confidential settlement agreement.

A. Interlocutory Appeal

The Commission will first address Verizon's claim that Core's appeal is premature. As Verizon indicated in its reply, and as the Commission has noted on several occasions, as a general matter, interlocutory decisions of the Commission or Hearing Examiners are not subject to immediate appeal. .

Verizon cites the Commission’s reliance upon § 12-303 of the Courts and Judicial Proceedings Article in Case No. 8881 for the proposition that the Commission’s standard for granting an interlocutory appeal is identical to the judicial standard. In Case No. 8881, the Commission overstated its reliance upon § 12-303. It is manifest that § 12-303 is applicable to the Maryland judiciary only, and is not applicable to the Commission as a matter of law. While the Commission analyzed the question of an interlocutory appeal consistent with the statute, we inadequately articulated in Case No. 8881 that § 12-303 was merely persuasive authority and not binding upon the Commission. We now take that extra step to clarify that the Commission’s reference to procedural statutes and rules applicable to the judiciary, and the case law analyzing them, is a convenient analytical tool which may or may not be relied upon in analogous circumstances confronted at the Commission. Unless the Commission expressly adopts a judicial procedure or doctrine as its own, analysis relying upon analogies to judicial procedures or doctrines is not an adoption of those standards by the Commission. To the extent that it appears that the Commission adopted § 12-303 for the consideration of interlocutory appeals in Order No. 77926 in Case No. 8881, we hereby clarify and, to the extent necessary, overrule that determination.

The Commission, unlike a judicial body, is an administrative agency charged with implementing its statutory authority, and as such, “the Commission is not bound by the rules of evidence or procedure of any court . . .” *PUC Art. § 3-101*. Instead, the Commission’s proceedings are to be governed by the regulations and practices established by the Commission. Accordingly, so long as the due process rights of parties

are protected, Commission deference to efficiency and practicality considerations is entirely appropriate.

The Commission, as an administrative agency, has the discretion to manage its own docket, including that of the Hearing Examiner Division which is an extension of the Commission itself, in any manner it deems appropriate. The Commission's aforementioned discretion is constrained only by the statutory and constitutional rights of parties, and rights established through the Commission's rules of practice and procedure.

The Commission has enunciated its own standard for determining when an exception to the rule disallowing interlocutory appeal is appropriate. Specifically, "[t]he Commission's policy is to take action on interlocutory appeals only in exceptional circumstances." *In re Columbia Gas*, 80 Md. PSC 312 (1989). This standard affords the Commission the necessary discretion to address exigent circumstances. Such discretion is entirely necessary and appropriate for the efficient administration of the Commission.

Nonetheless, as recognized by the Commission in Order No. 77926, the rules of evidence or procedure applicable in the Maryland Courts, while not binding on the Commission, provide useful guidance to the Commission in applying its own procedures. The Commission's decision to review an interlocutory ruling of a Hearing Examiner is made on a case-by-case basis in accordance with the facts of the specific case.

With respect to the instant matter, the Commission observes that the Hearing Examiner's Ruling on the Motion to Dismiss conclusively determines disputed questions raised by Core, and, as such, resolves important issues completely separate from the merits of the Complaint. The Commission further notes that review of the Hearing Examiner's Ruling after the Hearing Examiner has concluded all proceedings does not

efficiently utilize the Commission's or the parties' resources and that the Commission's ability to manage its own docket and delegations remains a matter subject to its discretion. Furthermore, as the parties have acknowledged, the claims on appeal have a degree of commonality with the claim retained by the Hearing Examiner as there are instances of shared facts and evidence between all of the claims arising from Core's Complaint. As a consequence of these considerations, the Commission determines that this matter does constitute an exceptional circumstance and, as such, the Commission's interlocutory consideration of the Hearing Examiner's grant of the motion to dismiss is warranted. The Commission notes that this determination is only applicable to the interlocutory ruling under review in this Order.

B. *Res Judicata* Application

The ultimate issue presented for the Commission's consideration is whether the Hearing Examiner correctly applied the principles of *res judicata* in his ruling on the Motion to Dismiss Core's Complaint with respect to the Mount Airy and Damascus Wire Centers based upon the final decision issued in Case No. 8881 and the FCC Complaint Proceeding.³ As the Hearing Examiner provided a thorough review of the timelines and pertinent contracts, the Commission will not repeat that information here. The Commission does not believe that the Hearing Examiner applied the wrong standard of review in his considerations of the motions to dismiss. However, the Commission finds that the Hearing Examiner erred in his determination that Core's claims for the Mount

³ We hasten to add that the judicial doctrine of *res judicata* is not literally applicable to Commission proceedings. Consistent with our discussion of interlocutory appeals above, our discussion of *res judicata* herein reflects our finding that the *res judicata* case law represents a useful, but not binding, tool for analyzing the issue presented.

Airy and Damascus Wire Centers were based on the same cause of action, i.e., transaction, as Core's claims in Case No. 8881 and the FCC Complaint Proceeding, respectively.

The Court of Appeals has indicated that

Underlying the doctrine of . . . res judicata are policy, practical necessity and justice considerationsThe functions of this doctrine . . . are to avoid the expense and vexation of multiple lawsuits, conserve judicial resources, and foster reliance on judicial action by minimizing the possibilities of inconsistent decisions.

Rourke v. Amchem Prods., 2004 Md. LEXIS 791 *48-49 (citations omitted).

Furthermore,

Under Maryland Law, the requirements of res judicata or claim preclusion are: 1) that the parties in the present litigation are the same or in privity with the parties to the earlier dispute; 2) that the claim presented in the current action is identical to the one determined in the prior adjudication; and 3) that there was a final judgment on the merits. . . . Therefore, a judgment between the same parties and their privies is a final bar to any other suit upon the same cause of action and is conclusive, not only as to all matters decided in the original suit, but also as to matter that could have been litigated in the original suit.

Colandrea v. Wilde Lake Community Ass'n, 361 Md. 371, 392 (2000) (citations omitted).

In the matter now before us, it is undisputed that the first and third principles of *res judicata* have been met, i.e., the parties are the same, and final judgments were rendered in Case No. 8881 and the FCC Complaint Proceeding. The question decided by the Hearing Examiner's Ruling was whether the cause of action which Core seeks to have litigated in Case No. 9005 is the same as that already litigated in Case No. 8881 or the

FCC Complaint Proceeding. If they are in fact the same cause of action, then *res judicata* operates to bar further litigation.

The test to be used to determine whether two causes of action are the same cause of action is the transaction test of Section 24 of the Restatement (Second) of Judgments, first adopted by the Court of Appeals in *Kent Co. Bd. of Educ. v. Bilbrough*, 309 Md. 487 (1987). In *Bilbrough*, the Court of Appeals indicated that “[w]hat factual grouping constitutes a ‘transaction’, and what groupings constitute a ‘series’, are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties’ expectations or business understanding or usage.” *Id.* at 498.

With respect to the FCC Complaint Proceeding, the Commission notes that the FCC did not decide the claim raised by Core in Case No. 9005 pertaining to the Damascus Wire Center. Instead, the FCC broadly concluded that Verizon failed to provide interconnection in the Washington Metropolitan LATA on just and reasonable terms in accordance with §251(c)(2)(D) of the Telecommunications Act of 1996, and as such failed to comply with its interconnection agreement with Core. *FCC Complaint Proceeding* at ¶¶51-54. Additionally, the FCC denied Core’s claim of discriminatory treatment. *FCC Complaint Proceeding* at ¶54. With respect to the other claims raised by Core, the FCC dismissed them *without prejudice*. *See, FCC Complaint Proceeding* at ¶55. The Court of Appeals has clearly indicated that “[t]he effect of the designation ‘without prejudice’ is simply that there is no adjudication on the merits and that, therefore, a new suit on the same cause of action is not barred by principles of res

judicata.” *Cooper v. Bikle*, 334 Md. 608, 616 (1994). Verizon’s use, or failure to use, existing facilities at the Damascus Wire Center was not a cause of action finally decided in the FCC Complaint Proceeding, and as such, the FCC Complaint Proceeding could not be used as a bar to litigation of that claim in Case No. 9005. Accordingly, the Hearing Examiner’s Ruling pertaining to the Damascus Wire Center is reversed, and the matter remanded for further consideration.

The Hearing Examiner determined that the Baltimore Wire Center claim decided in Case No. 8881 barred Core’s Mount Airy claim because,

the same provision extends through each Interconnection Agreement and is the basis for the allegation that Verizon breached the agreement by failing to timely interconnect with the Core network. The amendment of the 8881 Complaint to eliminate claims regarding the Mount Airy Wire Center demonstrates that Core could have litigated that claim in that proceeding. Having not done so, this claim is now barred by *res judicata*.

Hearing Examiner Ruling at 6.

The Hearing Examiner ended his inquiry into the matter too soon. The Hearing Examiner established that the Baltimore Wire Center claim and the Mount Airy Wire Center claim were related in time and motivation. However, the claims are not completely related in origin. The origin of each of the claims begins with the underlying contract, but there ends their similarity. The claims involve distinct wire centers and are undeniably independent of one another. They are, in essence, individual transactions initiated under the authority of a similar interconnection agreement. The underlying cause of action of each claim begins with the individual request for interconnection at the specific wire center. While it would have been possible for Core to litigate both the

Mount Airy and Baltimore Wire Center claims together and such joint litigation may have helped condense the Commission's case load, Core was not required to do so because the claims were independent of one another.

The Commission finds that a pragmatic review of the circumstances surrounding each of the claims contained in Core's various complaints supports a finding that each claim was a separate transaction based upon the effective interconnection agreements between Core and Verizon.

Based upon the foregoing decision, the Commission finds it unnecessary to address the remainder of the issues raised by Core and Verizon.

IT IS THEREFORE, this 3rd day of February, in the year Two Thousand and Five, by the Public Service Commission of Maryland,

ORDERED: That for the reasons stated herein, the Hearing Examiner's Ruling with respect to the Mount Airy and Damascus Wire Centers is reversed and the matters are remanded for further consideration.

/s/ Kenneth D. Schisler

/s/ J. Joseph Curran, III

/s/ Harold D. Williams

/s/ Allen M. Freifeld

Commissioners